File: FOIA

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

SPECIAL

April 16, 1984

LEGISLATIVE REFERRAL MEMORANDUM

TO: LEGISLATIVE LIAISON OFFICER

Central Intelligence Agency
National Security Council
Department of Defense
Department of State

44

SUBJECT: Draft DOJ report on H.R. 5164, a bill to provide FOIA relief to the CIA

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than Monday, April 23, 1984. (NOTE: H.R. 5164 was circulated to agencies for comment on 4/13/84.)

Direct your questions to Branden Blum (395-3802), the legislative attorney in this office.

[redacted] 25X1

Gregory Murr for James C. Murr for
Assistant Director for
Legislative Reference

Enclosure

cc: C. Wirtz
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Approved For Release 2008/12/11 : CIA-RDP89B00236R000200190025-5

U. S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

22 FEB 1984

The Honorable Jack Brooks
Chairman
Committee on Government Operations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is in response to your requests for the views of the Department of Justice on S. 1324 and H.R. 4431, virtually identical bills "To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency." The Department of Justice generally supports enactment of legislation that would provide the CIA with relief from the burdensome review requirements of the Freedom of Information Act, but prefers an approach that would also ease the litigation burden on CIA, Justice, and the courts.

In general, the bills would amend the National Security Act by adding a new § 701 relating to disclosure of Central Intelligence Agency records to the public. Section 701(a) would exclude the operational files located in the CIA's Directorate of Operations, Directorate for Science and Technology, and Office of Security from the requirements of the Freedom of Information Act (FOIA) to search its files and disclose any nonexempt records to any person making a request for them under the Act. The proviso to Section 701(a) and Section 701(c) would limit the scope of that exclusion, so that the CIA would continue to respond to FOIA requests for operational files with respect to (1) requests by United States citizens or resident aliens for information on themselves, (2) any special activity the existence of which is not exempt under the FOIA, and (3) the subject of a pending investigation by certain authorities of possible impropriety or violation of law, Executive order, or Presidential directive in the conduct of an intelligence activity.

Although this legislation, by its terms, relates solely to information in the files of the CIA, it has significance

for the Department of Justice which, of course, represents the CIA in litigation under the Freedom of Information Act. The Department of Justice shares the CIA's judgment that this legislation would relieve significant burdens in responding to FOIA requests for information contained in the enumerated files. Although many agencies are burdened with FOIA requests, the compartmented nature of CIA files and the extreme sensitivity of the information contained in them pose particular difficulties in searching and processing requested material.

These difficulties are only compounded when litigation over the CIA's FOIA responses ensues. The Department can only assign to CIA cases those attorneys who have the necessary security clearances to deal with the information at issue. Working with the CIA, these attorneys must formulate the sort of public affidavit called for in Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976), and Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978), without at the same time disclosing the very information they are required to protect. Often, for the courts to appreciate the national security implications of the records at issue, extensive classified affidavits explaining their sensitivity must be filed. The courts, in turn, must struggle with the paradox of explaining the reasons for their decisions not to disclose particular information without disclosing the underlying facts.

This extensive expenditure of time and effort by senior intelligence personnel and by attorneys at the Department and the CIA, however, results in virtually no benefit to the public, and only drains the government's resources and unnecessarily increases the cost to the public of the FOIA. With respect to the records covered by S. 1324 and H.R. 4431, at the conclusion of this lengthy process, the courts have almost uniformly upheld the classification of the materials at issue.

This legislation would end the initial FOIA search burden on the CIA which has proven to lack any offsetting public benefit. Equally important, the legislation should significantly allay the perception of those who cooperate with the CIA that the confidentiality of the information furnished by them cannot be assured. In our judgment, however, this legislation does nothing to ease the litigation burden on the CIA, Justice, and the courts but may even serve to increase it. Litigants would be invited to challenge the regulations of the Director of Central Intelligence, his subordinates' compliance with them, and the filing practices of the CIA. Thus, while the legislation would ease the current litigation burden over the CIA's substantive FOIA responses, it would create a new field of litigation in which there are no

existing precedents to guide the attorneys or the courts. Therefore, the Department of Justice prefers a straightforward approach that would simply provide the CIA with relief from the unwarranted burden of searching and analyzing its most sensitive files but would more narrowly limit the permissible scope of judicial review of the Agency's determinations.

The Office of Management and Budget has advised this Department that enactment of this legislation would be in accord with the program of the President.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

Department of Justice

STATEMENT OF

MARY C. LAWTON
COUNSEL FOR INTELLIGENCE POLICY

BEFORE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE
U.S. HOUSE OF REPRESENTATIVES

ON

H.R. 3460 and H.R. 4431 - To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency.

February 8, 1984

Mr. Chairman and Members of the Subcommittee:

We welcome the opportunity to appear before the Subcommittee to support legislation granting significant relief to the Central Intelligence Agency from burdens currently imposed by the Freedom of Information Act. The Subcommittee has before it two proposals to achieve this end - H.R. 3460 and H.R. 4431. For reasons I will outline later, the Department of Justice prefers the approach taken in H.R. 3460.

This Committee is already aware of the enormous burden FOIA imposes on the CIA. The compartmented nature of its files and the sensitivity of the information contained in them pose particular difficulties in searching and processing requested materials. Moreover, the subtlety of intelligence information necessitates review by skilled intelligence analysts rather than FOIA specialists, thus diverting the intelligence analysts from their primary mission. The Committee may not be as familiar with the burden litigation over CIA files imposes on the Department of Justice. To begin with, the Department can assign to CIA FOIA cases only those attorneys who have the necessary clearances to deal with the information at issue. Working with the CIA, these attorneys must formulate the sort of public affidavit called for in Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) and Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978), without at the same time

disclosing the very information they are requested to protect. Often, in order for the courts to appreciate the national security implication of requested records, extensive classified affidavits explaining their sensitivity must be filed. The courts, in turn, must struggle with the paradox of explaining the reasons for their decisions without disclosing the underlying facts. Yet this enormous expenditure in intelligence, legal and judicial time and energy invariably results in the classification being upheld and the requester denied the information.

If there were any public benefit served by FOIA requests of this type it would be appropriate for the Committee to weigh that benefit against security concerns. But there is no such benefit with regard to the operational files of the CIA. From the security standpoint a FOIA request diverts intelligence personnel from their mission, diminishes compartmentalization, ties up attorneys for CIA and Justice and clogs already crowded court dockets.

All that the public receives is the not inconsiderable bill.

Both H.R. 3460 and H.R. 4431 recognize that the time has come to eliminate this waste of resources. They focus on the most sensitive records of the CIA - those dealing with operations, intelligence sources and methods and the exchange of information with foreign liaison services. The bills provide FOIA relief only to files maintained in the Directorates of Operations and Science and Technology and the Office of Security. At the same time, they provide the possibility of FOIA access to files concerning special activities the existence of which are unclassified, matters which

have been investigated for possible violations of law and information concerning U.S. persons requested by those persons. Where the bills differ is in the means proposed to achieve the goal of FOIA relief. Under H.R. 3460 the Congress would describe the categories of files which should be exempt, and exempt them. The mechanism under H.R. 4431 is much more elaborate. The DCI would be required to issue regulations for the identification of exempt records within the statutory categories. Deputy Directors or Office Heads would then propose the designation of certain files within the category of records for which they have responsibility, and such designations would be reviewed at least every ten years. All designations and redesignations would require DCI approval. The courts would be authorized to review the regulations, the designations and even the placement of documents in the particular files.

Both bills would ease the initial FOIA search burden on the CIA. In our judgment, however, H.R. 4431 does nothing to ease the litigation burden on CIA, Justice and the courts but may even serve to increase it. Litigants would be invited to challenge the DCI's regulations and his subordinate's compliance with them and the filing practices of the CIA. This would create a new field of litigation in which there are no existing precedents to guide the attorneys or the courts. It takes little imagination to conclude that, at least from the Justice Department perspective, the cure offered by H.R. 4431 may well prove worse than the disease.

Accordingly, Mr. Chairman, we urge the Committee to adopt the straightforward approach of H.R. 3460 which provides the CIA with releif from the unwarranted burden of searching and analyzing files which, by their very nature, are protected from release.

We urge the Committee to question seriously whether the price of such relief should be additional burdens on the courts and the Department of Justice of the type inherent in H.R. 4431.

We have no other comments, Mr. Chairman, but will be happy to respond to any questions.

Department of Justice

STATEMENT OF

MARY C. LAWTON
Counsel for Intelligence Policy

Before

The Senate Select Committee on Intelligence

On

S. 1324 -- To amend the National Security Act of 1947 to regulate public disclosure of information held by the Central Intelligence Agency

June 28, 1983

Mr. Chairman and Members of the Committee:

We appreciate the opportunity to appear before the Committee in support of S. 1324. While the bill, by its terms, relates solely to information in the files of the Central Intelligence Agency, it has significance for the Department of Justice which, of course, represents the CIA in Freedom of Information Act litigation.

As the Committee is aware Freedom of Information Act requests to the CIA impose enormous burdens on the Agency and on the Department of Justice when litigation ensues. While many agencies are burdened with FOIA requests, the compartmented nature of CIA files and the sensitivity of the information contained in them pose particular difficulties in searching and processing requested materials. These difficulties are compounded in litigation. The Department of Justice can only assign to CIA cases those attorneys who have the necessary clearances to deal with the information at issue. Working with the CIA, these attorneys must formulate the sort of public affidavit called for in Phillippi v. CIA, 546 F.2d 1009 (D.C. Cir. 1976) and Ray v. Turner, 587 F.2d 1187 (D.C. Cir. 1978), without at the same time disclosing the very information they

are required to protect. Often, in order for the courts to appreciate the national security implications of requested records, extensive classified affidavits explaining their sensitivity must be filed. The courts, in turn, must struggle with the paradox of explaining the reasons for their decisions without disclosing the underlying facts. And all to what end? When the litigation is over the information remains classified just as it was before the request was filed.

If there were any public benefit served by FOIA requests of this type, consideration of this bill would require this Committee to weigh the benefit against security concerns. With respect to the records covered by S. 1324, however, we perceive no such benefit. The CIA must divert valuable intelligence personnel from their mission to identify and review the records. Processing must be scrutinized to minimize the risk of erroneous release which might jeopardize sources or diminish the value of the intelligence. Attorneys at the Agency and the Department spend countless hours preparing documents. Already heavy court dockets are further burdened by these cases. Yet in the end the public receives only the bill for this needless expense.

The findings set forth in S. 1324 essentially recognize that this process wastes intelligence community and litigative

resources without any offsetting public benefit. Equally important, S. 1324 recognizes the problem posed by the perception of those who cooperate with intelligence agencies that protection of information furnished cannot be ensured. Whether or not this perception is justified, it is real. Congressional recognition that the problem exists and that it warrants remedy should help to allay the concern.

I am sure that the Committee is aware that the Department of Justice sought in the last Congress and is seeking in this Congress generic relief from some of the undue burdens imposed by FOIA on the government as a whole. We are delighted that the Senate Judiciary Committee has agreed to report S. 774. The need for that legislation, however, in no way diminishes the need for legislation such as S. 1324.

This bill focuses on the specific protection of CIA sources and methods and addresses the particular problems of processing and reviewing compartmented files. It is, quite properly, an amendment to the National Security Act of 1947. As exemption (b)(3) of the Freedom of Information Act itself contemplates, it addresses the specific need for protection of an agency's files

in the organic act applicable to that agency. Only a proposal of this type could address with such specificity the files to be protected. Precisely because S. 1324 deals with the CIA alone, it can describe the exempt files in terms which address that Agency's particular filing system. It is entirely appropriate that it be considered by the Congress as separate and distinct from efforts to secure government-wide amendments to the Freedom of Information Act itself.

We have no further comments, Mr. Chairman, other than to reiterate our wholehearted support of S. 1324 and urge its speedy enactment.